COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1689 **Cir. Ct. No. 2004CV132**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

FAS, LLC,

PETITIONER-RESPONDENT,

V.

TOWN OF BASS LAKE,

RESPONDENT-APPELLANT,

SAWYER COUNTY ZONING COMMITTEE, SAWYER COUNTY BOARD OF APPEALS AND SAWYER COUNTY ZONING ADMINISTRATOR,

RESPONDENTS-RESPONDENTS,

STATE OF WISCONSIN DEPARTMENT OF JUSTICE,

INTERVENING-RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Town of Bass Lake appeals a circuit court order that reversed a Sawyer County Board of Appeals decision. The Board rejected a lakeshore condominium plat recorded by FAS, LLC. The Board concluded a creek that physically bisected the parcel of land also legally divided the parcel into two substandard lots, neither of which satisfied the minimum lakeshore frontage requirement. The circuit court concluded that, because a landowner holds title to the center of a creek bed and FAS owns both shores, the creek does not legally divide the parcel into two lots and therefore the lot satisfied the lakeshore frontage requirement.

¶2 The Town raises arguments addressing: (1) whether Johnson Creek legally divides the parcel into two lots and, therefore, whether the mouth of the creek can be included in the lakeshore frontage calculation; and (2) whether the case should be remanded to the Board for a de novo hearing, because the Board erroneously concluded as a matter of law that it had no authority to conduct such a hearing. We conclude that the creek does not legally divide the parcel and there is no basis for remand. Accordingly, we affirm the circuit court's order.[1]

BACKGROUND

¶3 FAS acquired property in Bass Lake situated on the shores of Lac Court Oreilles. In a portion of that property, FAS created Bayshore Pines

[1] The Town raises a number of other arguments in its brief that are difficult to decipher or comprehend. Those arguments appear to rely on a premise we reject: that Johnson Creek legally divides the parcel into two lots. To the extent we have not addressed an argument raised in the Town's appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

Condominium, which consists of four residential units situated on a lot with 103 continuous feet of lakeshore frontage. The lakeshore frontage includes the mouth of Johnson Creek, which meanders through the lot.

¶4 The Town contended that Johnson Creek divided the parcel containing Bayshore Pines into two lots; therefore, the mouth of the creek could not be included in the lakeshore frontage calculation and the plat lacked the requisite one hundred feet of frontage. The Town based its arguments on a 1977 attorney general opinion. The Sawyer County Zoning Committee rejected the Town's position, concluding Bayshore Pines consisted of a single lot that satisfied the minimum lakeshore frontage requirement.

¶5 The Town appealed to the Board, which conducted an appellate-like review of the Committee's decision. No party objected to the procedure or requested to submit additional evidence. The Board concluded the Committee erred as a matter of law by not following the attorney general opinion. The Board concluded, based on the attorney general opinion, that Johnson Creek divided the parcel into two lots, both of which failed to satisfy the minimum lakeshore frontage requirement.

¶6 FAS commenced this certiorari action challenging the Board's determination. The circuit court held the Board erred by relying on the attorney general opinion because the opinion was of questionable authority. The court concluded that the creek did not legally divide FAS's parcel into two lots and that the mouth of the creek could be included in the lakeshore frontage calculation. Accordingly, it reversed the Board's decision.

STANDARD OF REVIEW

¶7 On certiorari review, we review the board's decision, not the decision of the circuit court. ***Board of Regents v. Dane County Bd. of Adj.***, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. Our review is limited to determining: (1) whether the board kept within its jurisdiction; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might make the decision it did. ***Id.*** The Town's arguments challenge whether the Board proceeded on a correct theory of law. We review questions of law independently. ***Fabyan v. Waukesha Cty. Bd. of Adj.***, 2001 WI App 162, ¶12, 246 Wis. 2d 851, 632 N.W.2d 116.

DISCUSSION

Whether Johnson Creek Legally Divides FAS's Parcel Into Two Lots

¶8 The Town argues that state law mandates that where a parcel is physically bisected by a navigable stream, the parcel consists of two lots. It contends that Johnson Creek divides Bayshore Pines into two substandard lots that cannot fulfill the minimum lakeshore frontage requirements.

¶9 The "state law" the Town relies on to support its argument is an attorney general opinion, 66 Wis. Op. Att'y Gen. 1 (1977). As FAS correctly points out, attorney general opinions are not binding authority on this court. *See* ***Ahlgren v. Pierce Cty.***, 198 Wis. 2d 576, 583, 543 N.W.2d 812 (Ct. App. 1995). Here, the Town relies on a paragraph of the attorney general opinion that notes that abutting landowners to navigable streams "hold a qualified title to the center

of the stream bed," while the state holds title to "lands underlying navigable lakes," and then concludes "parcels separated by navigable waters are no more susceptible to functional integration than parcels separated by public highways." 66 Wis. Op. Att'y Gen. at 8. The opinion includes legal authority for its statements regarding title to lands underlying navigable lakes and streams, but none for its ultimate conclusion that a navigable stream divides a parcel into two lots.

¶10 The Town likewise cites no state law or county ordinance supporting its contention that a parcel bisected by a creek is not treated as a single lot or that a creek mouth bisecting a lot cannot be included for purposes of determining lakeshore frontage. FAS, on the other hand, cites long-standing authority that landowners abutting navigable streams hold qualified title to the creek bed to the center of the creek. *See, e.g.,* ***Town of Campbell v. City of La Crosse***, 2001 WI App 201, ¶16, 247 Wis. 2d 946, 634 N.W.2d 840 ("That a riparian owner holds title to the thread, or the geographical center, of a stream is an oft-repeated proposition of law in this state."). Because the abutting landowner holds title to the center of the creek, where a single landowner owns both banks, the landowner "owns" the entire creek. Therefore, we conclude that the attorney general opinion on which the Town bases its argument is unpersuasive. Despite Johnson Creek physically dividing FAS's parcel, legal ownership is unified and the parcel constitutes a single lot for purposes of calculating lakeshore frontage. Thus, the Board erred as a matter of law when it concluded the attorney general opinion was binding state law and the circuit court properly reversed the Board's decision.

Whether to Remand to the Board for a De Novo Hearing

¶11 The Board concluded it had no authority to hold a de novo hearing, relying on this court's opinion in ***Osterhues v. Bd. of Adj. for Washburn Cty.***, 2004 WI App 101, 273 Wis. 2d 718, 680 N.W.2d 823. However, our supreme court subsequently reversed that opinion, holding that a county board of appeals has the authority to conduct a de novo review of a county zoning committee decision. ***Osterhues v. Bd. of Adj. for Washburn Cty.***, 2005 WI 92, ¶2, 282 Wis. 2d 228, 698 N.W.2d 701. The Town argues that, because the Board proceeded on an error of law when it concluded it could not hold a de novo hearing, we should remand the matter to the Board for it to take further evidence.

¶12 FAS counters, and we agree, that remand is inappropriate here. The Town did not object to the procedure utilized by the Board, nor did it request to submit additional evidence. There are no disputed facts raised in this court; the arguments the Town raises are questions of law. Furthermore, while the Town seeks a remand so that additional evidence can be introduced, it does not explain what evidence it would present or how that evidence would affect the Board's decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.